

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Fibervision, Inc.)	
)	
Petition for Determination of Effective)	CSR-5913-E
Competition in Laurel, MT (MT0034) and)	
Park City, MT (MT0135))	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 26, 2002

Released: August 27, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Fibervision, Inc. ("Fibervision") has filed with the Commission a petition alleging that Fibervision is subject to effective competition from competing service providers in Laurel and Park City, Montana (the "Communities").¹ Fibervision alleges that its cable system serving the Communities is subject to effective competition, pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act"),² and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission's rules.³ Fibervision bases its allegation of effective competition on the competing services provided by two direct

¹ A Joint Motion for Expedited Review was filed by USA Digital Cable, LLC ("USA Digital") and Cable Montana, LLC ("Cable Montana") in this proceeding. Cable Montana is commonly owned with USA Digital, which is the controlling entity and lessee of multichannel multipoint distribution service ("MMDS") facilities whose protected service area covers the communities of Laurel and Park City. See Joint Motion for Expedited Review at 1 and Petition at 1, n.1. The parties assert that the grant of this petition will ensure that Cable Montana's planned acquisition of Fibervision's cable system complies with the Commission's rules concerning MMDS-cable cross-ownership. See 47 U.S.C. § 533; 47 C.F.R. § 21.912 (prohibiting MMDS-cable cross-ownership, in the absence of effective competition). The Commission has said that parties must file for special relief pursuant to Section 76.7 when demonstrating compliance with Section 21.912 based on the effective competition exception to Section 21.912. See *Letter dated January 21, 1998 from Roy J. Stewart, Chief, Mass Media Bureau to Charles G. Cline, Kenneth Garrard, BellSouth Wireless Cable, Inc. and BellSouth Corporation* (File Nos. 50849-CM-AL(1)-97 and 50851-CM-AL(2)-97). Petition at 1, n.1. The parties also assert that the grant of this petition will assure compliance with the Commission's rules concerning ITFS-cable cross-ownership because USA Digital leases excess capacity of ITFS stations having their main transmitter within 20 miles of Park City and Laurel. See 47 C.F.R. § 74.931(h) (prohibiting ITFS-cable cross-ownership). Petition at 1, n.1.

² 47 U.S.C. § 543.

³ 47 C.F.R. § 76.905(b)(2).

broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and EchoStar Communications Corporation ("EchoStar"). No opposition to the petition was filed.⁴

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 76.905 of the Commission's rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Fibervision has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁷

4. Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁸ Fibervision has provided evidence of the advertising of DBS service in news media serving the Communities.⁹ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.¹⁰ Fibervision has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise areas. Fibervision has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and EchoStar.¹¹ Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households

⁴ Based upon our action herein, the parties' request for expedited action is rendered moot. *See* Joint Motion for Expedited Review at 3.

⁵ 47 C.F.R. § 76.906.

⁶ 47 C.F.R. § 76.905.

⁷ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁸ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁹ Petition at 3 and Exhibit 1.

¹⁰ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 3-4 and Exhibits 2-3. Exhibit 2 includes the channel lineup for Fibervision's cable system serving the Communities and Exhibit 3 contains the nationwide channel lineups of DirecTV and EchoStar.

¹¹ Petition at 2-4.

subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Fibervision sought to determine the competing provider penetration in its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers in the Communities on a five-digit zip code basis.¹² However, rather than simply accepting SkyTrends' figures, Fibervision assumes that some of the DBS subscribers identified in the report may actually live in zip codes outside of the Communities.¹³ To account for such a possibility, Fibervision has devised a formula that compares U.S. Census household data for the Communities and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.¹⁴ To further bolster its claim of effective competition, Fibervision then reduces the estimated DBS subscriber count by 10 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.¹⁵ The Commission believes that Fibervision's methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

6. While it is unable to determine the largest MVPD in the Communities, Fibervision establishes effective competition by demonstrating that its own penetration level also exceeds 15 percent in each franchise area.¹⁶ The Laurel franchise area has 555 DBS subscribers out of 2,529 households, resulting in a 21.9 percent penetration level.¹⁷ In the Park City franchise area, the DBS penetration level is 35.2 percent (116 DBS subscribers out of 330 households).¹⁸ Thus, assuming that Fibervision is the largest MVPD in each franchise area, the aggregate DBS subscribership surpasses the 15 percent penetration threshold.¹⁹ Conversely, assuming that one of the DBS providers is the largest MVPD, Fibervision's own penetration rate (30.01 percent in Laurel and 48.5 percent in Park City) surpasses the 15 percent threshold of the second prong of the competing provider test.²⁰ Based on this record, we find that Fibervision has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied.

¹² *Id.* at 5.

¹³ *Id.*

¹⁴ *Id.* at 5 and Exhibits 4-6.

¹⁵ *Id.* at 6, 8. According to documentation previously provided to the Commission, SkyTRENDS' zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." *See Charter Communications*, DA 02-1919 at n.13 (rel. Aug. 6, 2002).

¹⁶ Petition at 5-8. While Fibervision asserts that it is the largest MVPD in the Laurel franchise area because Fibervision's subscribership exceeds the aggregate subscribership for the DBS providers, the evidence provided by Fibervision on this point is inconclusive. *See id.* at Exhibit 4.

¹⁷ *Id.* at 6 and Exhibits 4-6.

¹⁸ *Id.* at 7-8 and Exhibits 4-6.

¹⁹ Fibervision also provides subscriber information from USA Digital for the Communities. *See id.* at 6-9. However, since Fibervision is involved in a pending transaction for the sale of its cable system serving the Communities to an affiliate of USA Digital, we will not consider USA Digital's subscribership as that of a competing provider for effective competition purposes. *Id.* at 1, n.1.

²⁰ Fibervision has submitted inconsistent subscribership data with respect to its operations within its Laurel franchise. *Id.* at Exhibits 4, 6. We will accept the more conservative estimate of 759 subscribers. *See id.* at Exhibit 4. As a result, Fibervision has a 30% penetration level (759 subscribers ÷ 2,529 households = 30.01) in Laurel and a 48.5% penetration level (160 subscribers ÷ 330 households = 48.48) in Park City. *Id.* at Exhibits 4-6.

7. Based on the foregoing, we conclude that Fibervision has submitted sufficient evidence demonstrating that its cable system serving the Communities is subject to effective competition.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Fibervision, Inc. **IS GRANTED**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

²¹ 47 C.F.R. §0.283.